

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A23-0735**

State of Minnesota,  
Appellant,

vs.

Jamaul Wendell Graham,  
Respondent.

**Filed December 26, 2023  
Appeal dismissed  
Gaïtas, Judge**

Isanti County District Court  
File No. 30-CR-20-624

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Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge;  
and Gaïtas, Judge.

**NONPRECEDENTIAL OPINION**

**GAÏTAS**, Judge

In this pretrial appeal, appellant State of Minnesota challenges the district court's decision to allow two out-of-state defense witnesses to testify at trial remotely rather than in person. Because the state fails to show that the district court's decision will have a

critical impact on the state’s ability to successfully prosecute the case—which is a threshold requirement for a state’s pretrial appeal—we dismiss the appeal.

## **FACTS**

The state charged respondent Jamaul Wendell Graham with one count of threats of violence and one count of misdemeanor domestic assault following an incident involving the mother of Graham’s child. According to the criminal complaint, Graham met with the complainant in a car at a gas station to discuss child support, and Graham struck her in the face multiple times, put his hands around her neck, and threatened to kill her. The complainant reported the incident to police the next day.

Graham pleaded not guilty to the charges and requested a jury trial. Before the trial, he advised the state that he intended to assert an alibi defense. Graham disclosed that witnesses would testify that he had been in Colorado for a family reunion at the time of the alleged incident.

The Friday or Saturday before the jury trial was scheduled to begin, Graham filed motions in limine. Among other motions, Graham moved the district court to allow three of his alibi witnesses to testify remotely via an online platform. Two of these witnesses lived in Denver, Colorado, and, according to Graham, requiring them to travel to Minnesota to testify “would cause them substantial [financial] hardship.” The third alibi witness lived in Iowa but was planning to travel to Colorado to visit a “family friend who [was] on hospice care.”

On Monday, the parties convened for the trial. Before summoning the prospective jurors, the district court addressed the parties’ motions in limine. Regarding the request to

present remote testimony, Graham's attorney told the district court that Graham's three alibi witnesses were unable to come to Minnesota for the trial. The attorney, along with a student attorney assisting the defense, explained that the two witnesses who resided in Colorado are "low income" and "work at the same time," and that it was financially "unfeasible" for them to travel, and that the third witness could not attend the trial due to the illness of a family friend. Graham's attorney noted that there was "a huge screen," and the jury could "see the person's testimony and judge their credibility just as if they're in the witness stand." He urged the district court to allow these witnesses to appear remotely for the limited purpose of providing Graham's alibi.

The prosecutor objected to Graham's motion. She stated, "[T]he credibility of these witnesses is very important, and the jury should be able to see their body language, their facial - - I mean, they'd be able to see facial, but the whole person tells a story." The prosecutor also noted that, because the case had been pending for three years, "[t]here certainly would've been time to prepare finances or whatever to be able to fly in witnesses." Finally, the prosecutor pointed out that, although some witnesses were permitted to appear remotely during the pandemic, "[t]hat is not an issue this time."

The district court granted Graham's motion to allow remote testimony by the two witnesses residing in Colorado but denied the motion as to the third witness. It framed its analysis using the two-part test recently applied by the Minnesota Supreme Court to review the constitutionality of the admission of remote testimony from a prosecution witness during the COVID-19 pandemic. *See State v. Tate*, 985 N.W.2d 291, 301 (Minn. 2023) (relying on the two-part test first articulated in *Maryland v. Craig*, 497 U.S. 836 (1990)).

The district court considered whether allowing Graham’s witnesses to testify remotely was “necessary to further an important public policy” and whether the reliability of their testimony could be guaranteed. *Id.*

The district court found “the idea that the [Colorado] witnesses do not have the wherewithal to travel here” to be “a compelling policy reason from the Court’s point of view to permit their [remote] testimony.” And it determined that their remote testimony would be reliable. The district court noted that it had “conducted a whole series in the last three years of court trials via Zoom [and] that witness credibility is assessed . . . using the same criteria: body language, tone of voice, manner, age and experience, interest in the outcome.” It also emphasized that the remote testimony would be shown live using the “big screen.” Regarding the third witness, however, the district court reasoned that denying the motion for remote testimony was appropriate because “[s]he’s in a very nearby neighboring state [and] . . . is in the process of arranging travel for something that hasn’t yet occurred.”<sup>1</sup>

After the district court announced its decision, the prosecutor gave notice of the state’s intent to appeal the decision. At the prosecutor’s request, the district court stayed the proceedings to enable the state to perfect an appeal.

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<sup>1</sup> The district court asked Graham to waive his Sixth Amendment right to confront the alibi witnesses in the event that they provided unanticipated testimony. *See* U.S. Const. amend. VI (providing that a defendant has the right “to be confronted with the witnesses against him”); *State v. Holliday*, 745 N.W.2d 556, 565 (Minn. 2008) (stating the confrontation clause “prohibits the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination” (quotation omitted)). Graham waived his ability to confront the witnesses in person.

The state appeals.

## DECISION

“The state’s right to pursue an appeal before trial of a criminal case is a limited right.” *State v. Strok*, 786 N.W.2d 297, 300 (Minn. App. 2010). This right must be established by statute or rule, and “because such appeals are not favored,” the rules governing state pretrial appeals are strictly construed. *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009). In Minnesota, subject to certain exceptions, the state can appeal from “any pretrial order” so long as it can establish that “the district court’s alleged error . . . will have a critical impact on the outcome of the trial.” Minn. R. Crim. P. 28.04, subd. 1, 2. If the state can establish “clearly and unequivocally” that the district court’s order “will have a critical impact on the state’s ability to prosecute the defendant successfully” and that the district court erred by issuing such an order, we will reverse. *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quotations omitted); *see also* Minn. R. Crim. P. 28.04, subd. 2.

Critical impact is a threshold issue, *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017), and absent such a showing, we must dismiss a state’s pretrial appeal. *See State v. Jones*, 518 N.W.2d 67, 69 (Minn. App. 1994); *State v. Joon Kyu Kim*, 398 N.W.2d 544, 550 (Minn. 1987). The critical impact threshold is met if the pretrial decision being appealed “either completely destroys the state’s case or significantly reduces the likelihood of a successful prosecution.” *State v. Sexter*, 935 N.W.2d 157, 161 (Minn. App. 2019) (quotations omitted), *rev. denied* (Minn. Dec. 17, 2019).

The state argues that the district court’s decision allowing Graham’s two alibi witnesses to testify remotely “significantly reduces the likelihood of a successful

prosecution” because it will impair the jury’s ability to assess the credibility of the witnesses. And according to the state, it is essential for these witnesses to testify in person because they will offer an alibi, which, if believed, will destroy the state’s case.

The state offers no authority to support its argument that the district court’s decision here, which simply concerns the *manner* of live witness testimony, will significantly reduce the likelihood of a successful prosecution. A review of our critical impact caselaw reveals that the situation here is not analogous to other cases where we have concluded that the state satisfied the standard. Those cases generally fall into two categories. We have found a critical impact when the district court has dismissed a charge or a complaint. *See State v. Glover*, 945 N.W.2d 60, 63-64 (Minn. App. 2020) (concluding that the district court’s dismissal of a count in the state’s complaint critically impacted the prosecution), *rev’d on other grounds*, 952 N.W.2d 190 (Minn. 2020); *State v. Gosewisch*, 921 N.W.2d 796 (Minn. App. 2018) (“[T]he state met that threshold showing because dismissal of a complaint satisfies the critical impact requirement.” (quotation omitted)), *rev. denied* (Minn. Mar. 19, 2019). And we have determined that decisions excluding important trial evidence would critically impact the underlying prosecutions. *See State v. Werner*, 725 N.W.2d 767, 770-71 (Minn. App. 2007) (reviewing a pretrial order suppressing a defendant’s confession to driving while under the influence and field sobriety test results); *State v. Stroud*, 459 N.W.2d 332, 334-35 (Minn. App. 1990) (reviewing a pretrial order suppressing DNA evidence linking the defendant to the charged criminal-sexual-conduct offense); *State v. Robb*, 590 N.W.2d 813, 815 (Minn. App. 1999) (reviewing a pretrial order suppressing the gun that formed the basis for a charge of “felonious possession of a firearm”). The district

court's decision allowing remote testimony will not impair the prosecution to the same extent as dismissal of a charge or exclusion of vital evidence.

Apart from the lack of analogous caselaw, we do not accept the state's argument that Graham's opportunity to present limited remote testimony will significantly affect the state's ability to successfully prosecute him. Qualitatively, the witnesses' testimony will be similar to live witness testimony. The witnesses will be placed under oath. They can be cross-examined. And they will be visible to the jury on a big screen, revealing facial expressions and body language. *See Tate*, 985 N.W.2d at 304 (stating that, in the Confrontation Clause context, the requirement that a witness be physically present can be excused if a court preserves "all of the other elements of the confrontation right: . . . oath, cross-examination, and observation of the witness[es]' demeanor" (quoting *Craig*, 497 U.S. at 851)). Indeed, a jury could find a remote alibi witness to be *less* credible than an in-person witness.

The state has not shown that the district court's decision here "significantly reduces the likelihood of a successful prosecution." *See Sexter*, 935 N.W.2d at 161. We conclude that the state has not satisfied its threshold burden to show that the district court's decision will have a critical impact on its case, *see Osorio*, 891 N.W.2d at 627, and accordingly, we dismiss the appeal.

**Appeal dismissed.**